

# In the United States Court of Federal Claims

No. 06-905C  
January 8, 2007  
NOT FOR PUBLICATION

JEROME TRAFNY,	)	
	)	
Plaintiff,	)	Application to proceed <i>in forma pauperis</i> ,
v.	)	28 U.S.C. § 1915(a), <i>pro se</i> plaintiff, Rule
	)	12(b)(1), subject matter jurisdiction, 28
THE UNITED STATES,	)	U.S.C. § 1491(a)(1), Eighth Amendment,
	)	tort claim
Defendant.	)	

Jerome Trafny, *pro se*, Adelanto, CA, plaintiff.

## OPINION AND ORDER

GEORGE W. MILLER, Judge.

Before the Court are plaintiff's application to proceed *in forma pauperis* under 28 U.S.C. § 1915(a) and plaintiff's complaint, each filed on December 27, 2006. Solely for the purpose of addressing whether the Court has jurisdiction, the application to proceed *in forma pauperis* is GRANTED. For the following reasons, however, plaintiff's complaint must be DISMISSED for lack of subject matter jurisdiction.

Because plaintiff is appearing *pro se*, his pleading is held to "less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Accordingly, the Court shall construe "plaintiff's pleadings liberally." *McSheffrey v. United States*, 58 Fed. Cl. 21, 25 (2003). "This latitude, however, does not relieve a *pro se* plaintiff from meeting jurisdictional requirements." *Bernard v. United States*, 59 Fed. Cl. 497, 499, *aff'd*, 98 Fed. Appx. 860 (Fed. Cir.), *reh'g denied*, 48 Fed. Appx. 860 (Fed. Cir. 2004).

Although the complaint is not a model of clarity, it appears that plaintiff is an inmate at the United States Penitentiary - Victorville in Adelanto, California, after having been convicted

in Utah of robbing a bank.<sup>1</sup> Plaintiff has glaucoma and alleges that he is legally blind. At some point prior to incarceration, he received trabecular surgery to arrest the deterioration of his eyesight. Plaintiff alleges that the Bureau of Prisons has refused to supply him with the ibuprofen tablets, the ketolorac ophthalmic solution (an anti-inflammatory eye drop solution), and the ReNu eye drops that he needs as a result of his surgery. Plaintiff further alleges that, without his medications, his eyesight will continue to deteriorate, causing him irreparable harm. Plaintiff's complaint seeks damages of \$13,140,000.

## DISCUSSION

The Court believes it is appropriate at this time to consider whether the case should be dismissed in accordance with Rule 12(b)(1) of the Rules of the United States Court of Federal Claims ("RCFC"). The RCFC allow the court to dismiss *sua sponte* an action for lack of subject matter jurisdiction. RCFC 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."). The plaintiff must set forth a jurisdictional basis for his claim. RCFC 8(a)(1) (the complaint must contain "a short and plain statement of the grounds upon which the court's jurisdiction depends."). "Determination of jurisdiction starts with the complaint, which must be well-pleaded in that it must state the necessary elements of the plaintiff's claim, independent of any defense that may be interposed." *Holley v. United States*, 124 F.3d 1462, 1465 (Fed. Cir. 1997).

Like all federal courts, the Court of Federal Claims is a court of limited jurisdiction. *Phaidin v. United States*, 28 Fed. Cl. 231, 233 (1993); *Dynalelectron Corp. v. United States*, 4 Cl. Ct. 424, 428, *aff'd*, 758 F.2d 665 (Fed. Cir. 1984) (table). Absent congressional consent to entertain a claim against the United States, the Court lacks authority to grant relief. *See United States v. Testan*, 424 U.S. 392, 399 (1976); *United States v. Sherwood*, 312 U.S. 584, 586 (1941). Congressional consent to suit in the Court of Federal Claims, which thereby waives sovereign immunity, must be explicit and strictly construed. *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *Fid. Const. Co. v. United States*, 700 F.2d 1379, 1383 (Fed. Cir. 1983).

Plaintiff states that this Court has jurisdiction over his complaint "due to the Payment [sic] amount being over \$10,000.00." Compl. at 2. *See* 28 U.S.C. § 1346(a)(2) (2000). Under

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<sup>1</sup> The facts are derived from the complaint and the attachments to the complaint. For purposes of this Opinion and Order, the Court construes the allegations set forth in the complaint and attachments in favor of plaintiff. *Hamlet v. United States*, 873 F.2d 1414, 1416 (Fed. Cir. 1989) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). However, because plaintiff did not number the attachments, and there are no page numbers beyond page five of the complaint, the Court is not always able to cite to a specific page in the complaint when setting forth the facts and allegations.

the Tucker Act, 28 U.S.C. § 1491(a)(1) (2000), the Court of Federal Claims has jurisdiction “to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.”

The Tucker Act constitutes a waiver of sovereign immunity. *United States v. Mitchell*, 463 U.S. 206, 212 (1983). However, the Tucker Act does not create a substantive right enforceable against the United States. *Testan*, 424 U.S. at 398. A claimant must identify another source of law that creates the substantive right and demonstrate that the source of law mandates compensation. *Mitchell*, 463 U.S. at 216–17. The other source of law must be “reasonably amenable to the reading that it mandates a right of recovery in damages.” *Doe v. United States*, 463 F.3d 1314, 1324 (Fed. Cir. 2006) (quoting *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 473 (2003)).

After careful examination of plaintiff’s voluminous complaint, and drawing all reasonable inferences in plaintiff’s favor, none of plaintiff’s allegations can be read to state a claim within this Court’s jurisdiction.

Plaintiff appears to allege that the withholding by prison personnel of his medication violates the Eighth Amendment to the United States Constitution. The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII. The Eighth Amendment, however, is not reasonably amenable to the reading that it mandates a right of recovery in damages. See *Calhoun v. United States*, 32 Fed. Cl. 400, 405 (1994) (“Nothing in the . . . Eighth Amendment[] creates a cause of action for money damages”).

Plaintiff also appears to assert a tort claim against the Government, based on the negligence of prison personnel in not supplying his medications. In the Claim for Damage, Injury, or Death that plaintiff filed with the Federal Bureau of Prisons and attached to his complaint, he seeks compensation for “[d]amage to Claimant by medical neglect by commission.” Compl. This Court, however, does not have jurisdiction to hear “cases . . . sounding in tort.” 28 U.S.C. § 1491(a)(1).<sup>2</sup>

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<sup>2</sup> In his Statement of the Case, plaintiff asserts that “Respondent(s) failed by *contract*, *statute*, policy and law to protect” plaintiff’s physical health. Compl. at 2 (emphasis added). However, plaintiff fails to indicate any specific contract or statute violated by defendant which would provide a basis for this Court to exercise jurisdiction in this case. “[T]here is no ‘duty [on the part] of the trial court . . . to create a claim which appellant has not spelled out in his pleading . . . .’” *Scogin v. United States*, 33 Fed. Cl. 285, 293 (1995) (quoting *Clark v. National Travelers Life Ins. Co.*, 518 F.2d 1167, 1169 (6th Cir. 1975) (alterations in original)).

Construing plaintiff's complaint "liberally," *McSheffrey*, 58 Fed. Cl. at 25, the Court holds that it lacks jurisdiction to hear plaintiff's claims. Accordingly, the Clerk shall enter judgment dismissing plaintiff's complaint without prejudice pursuant to RCFC 12(h)(3).

IT IS SO ORDERED.

GEORGE W. MILLER  
Judge